City of Lafayette Staff Report

For:	City Council
By:	John M Luttropp, Associate Engineer
Date Written:	April 2, 2008
Meeting Date:	April 14, 2008
Subject:	Unpermitted Removal of Public Sidewalk on Merriewood Drive

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Introduction

Staff previously received a complaint that the owners at 567 Merriwood Drive had removed a section of the public sidewalk along their property frontage and planted landscaping in the right of way. The owners acted without the benefit of an encroachment permit, and this matter was presented to the City Council at your meeting on November 13, 2007. At that meeting, the Council agreed to enter into a deferred improvement agreement with the Allens for the restoration of the City sidewalk along the Sandalwood Court frontage. The City Council directed staff to prepare the agreement for the Allens to sign and asked the Allens to remove the landscaping that they planted within the City's right of way on Sandalwood Court.

Since this meeting the Allens have complied with the requirement that they remove the landscaping. Staff has tried to work with the Allens to modify the City's standard deferred improvement agreement so that it would be acceptable to all parties. Despite our best efforts staff was unable to develop an agreement that was acceptable to the Allens and the City Attorney. As such staff seeks the Council's direction on whether to proceed with a summary abatement action to restore the unpermitted removal of City facilities.

Discussion

On January 8, 2008, staff sent the Allens a copy of the City standard deferred improvement agreement that was modified to fit the situation at hand, see attached Exhibit A. The Allens responded that they did not agree with the language of the agreement in that it gave the City Engineer too much discretion and that the agreement was one sided and overreaching. See attached letter Exhibit B.

In light of the Allens' numerous objections to the language of the agreement staff asked them to propose an agreement with terms that would be acceptable to them for the City Attorney to review. The Allens provided a revised, signed and notarized agreement on February 27, 2008. See attached Exhibit C. Upon review, the City Attorney had several concerns with the terms of the owner-proposed language and deemed it unacceptable in general. Staff contacted Mrs. Allen to negotiate further modifications that might alleviate the City Attorney's concerns and still be acceptable to the owners. Subsequently we sent a third version of the agreement to the property owners based on our understanding of our phone conversation, see attached Exhibit D. Mrs. Allen's letter dated March 14, 2008 rejects this latest effort by staff, see attached Exhibit E. Furthermore, it would appear that our attempts to reach a mutually acceptable arrangement and avoid a return of this matter to the City

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Council have been interpreted as bordering on harassment. As such staff does not believe additional dialogue at this point will yield any favorable results.

At this time Mrs. Allen has stated that her key issues are:

1. The Allens believe the replacement of the improvements they removed should only occur if and when additional sidewalks are constructed along Merriewood Drive. The point of contention lies in the extent of work associated with this larger project. The Allens have stated that the project should encompass the entire length of Merriewood Drive (approximately 1,450 LF) while staff believes a logical segment of sidewalk to construct would be from the Burton Valley School Driveway to the south to the intersection of Sandalwood Court (approximately 230 LF).

    - Staff believes, and the City Attorney concurs, that the construction of a useable segment of sidewalk on Merriewood Drive should constitute a reasonable "trigger" for the fulfillment of the deferred improvement. The segment of sidewalk between the Burton Valley School driveway and Sandalwood Court is a usable segment.

2. The Allens object to the fact that the City has reserved the right to pursue other remedies under law.

    - The City Attorney feels that this section should remain in the agreement to allow the City the flexibility to pursue other remedies for reimbursement of the costs associated with constructing the improvements if the owners of the property neglects, refuses, or fails to timely reimburse the City for the associated work.

3. The Allens have stated that the agreement should contain a clause stating that this agreement is in lieu of small claims court action and that it releases them of claims.

    - The City Attorney recommends against the City releasing the property owners of all claims associated with this matter at this time.

Within the last week at the writing of this staff report, the City Attorney found through her additional research a statutory provision in the California Street and Highways Code Section 5600 outlining the procedure for the repair or maintenance of sidewalks by the City and the subsequent reimbursement for this work by the adjacent property owner.

The process is as follows:

1. Notice the property owners of the required work.

2. City shall perform the required work if the property owners fail to respond.

3. Public hearing held for review of costs to be reimbursed by property owners.

4. If reimbursement is not received, lien the property in question or attach the costs as an assessment to the tax roll for the property

Next Steps

Staff recommends that the City Council consider the following three options:

1. Take no action and allow the changes in the right-of-way to remain. Given the concerns outlined in staff's previous report dated November 13, 2007, staff does not recommend this option. Furthermore, it establishes an undesirable precedence for the City's future attempts to regulate actions that violate the municipal code.

2. Accept the agreement proposed by the property owners. Given the concerns of staff and the City Attorney with various terms of the agreement, staff does not recommend this option.

3. Authorize staff to proceed with re-noticing of the property owners and if they fail to respond to restore the sidewalk, proceed with abatement and hold public hearing to determine cost and seek reimbursement from the property owners. If the owners fail to reimburse the City in a timely manner, commence the process to attach the cost to the property tax roll for the subject property.

Fiscal Impact

The cost to restore the improvements is estimated at $5,000.

Staff recommends that if the Council wishes to proceed with abatement, the cost should be funded from Account 011-360-861. City Council established this account to track unanticipated infrastructure repairs that may potentially be reimbursable.

Recommendation

City Council should direct staff to proceed with the re-noticing of the property owners and if they fail to respond restore the sidewalk, proceed with abatement and hold a public hearing to determine cost and seek reimbursement from the property owners. If the owners fail to reimburse the City within a timely manner, commence the process to attach the cost to the property tax roll for the subject property.

EXHIBIT A

Transmittal of Standard Deferred Improvement Agreement

LAFAYETTE
SETTLED 1848 — INCORPORATED 1968

CITY COUNCIL

Mike Anderson, Mayor
Don Tatzin, Vice Mayor
Brandt Andersson, Council Member
Carl Anduri, Council Member
Carol Federighi, Council Member

January 8, 2008

Mr. and Mrs. Allen
567 Merriewood Drive
Lafayette, CA 94549

Dear Mr. and Mrs. Allen:

During the City Council meeting of November 13, 2007, the City Council agreed to enter into a deferred improvement agreement with you for the restoration of the City sidewalk along your property's frontage on the southeast corner of the intersection of Sandalwood Court and Merriewood Drive. In addition the City Council determined that the trees planted along your frontage with Sandalwood Court must be relocated onto your property outside the City's right of way.

Please return a signed and notarized copy of the attached Deferred Improvement Agreement and relocate the trees by February 1, 2008, so that we may report a positive resolution of this matter to the City Council at its March meeting.

Sincerely,

John M Luttropp
Associate Engineer
City of Lafayette

3675 MT. DIABLO BLVD., SUITE 210, LAFAYETTE, CA 94549
TELEPHONE: (925) 284-1968 FAX: (925) 284-3169
http//:www.ci.lafayette.ca.us

RECORDED AT THE REQUEST OF
AND RETURN TO:

City of Lafayette
Engineering Services Division
3675 Mt. Diablo Boulevard, Suite 210
Lafayette, California 94549
Attn: City Engineer

DEFERRED IMPROVEMENT AGREEMENT

This Deferred Improvement Agreement is entered into as of this ____ day of _____, 200__, by and between the City of Lafayette, a municipal corporation ("City") and Desmond and Kathryn Allen(collectively, "Owner"). City and Owner are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties".

RECITALS

A. Owner owns certain real property more commonly known as 567 Merriewood Drive, Lafayette, California, Assessor Parcel Number 237-280-0017 and more specifically described in Exhibit "A" attached hereto and incorporated herein by reference ("Property").

B. As a remedy for the unpermitted removal of an existing sidewalk on the southwest corner of Merriewood Drive and Sandalwood Court, the City requires the restoration of frontage sidewalk improvements from the property's driveway on Sandalwood Court to the intersection with Merriewood Drive including the installation of a curb ramp at said intersection ("Improvements").

C. The City and Owner are willing to agree to a deferral of these Improvements in accordance with the terms and conditions hereafter set forth.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants contained in this Agreement the Parties agree as follows:

1. Improvements. Owner shall construct or have constructed at its own costs, expense, and liability the Improvements. The construction of the Improvements shall be deferred until such time as the City Engineer in his or her sole discretion determines that there is no further reason to defer construction of the Improvements because their construction is necessary for the public health, welfare and safety or is necessary for the orderly development of the surrounding area. The City Engineer shall notify Owner in writing to begin construction of the Improvements. The City Engineer shall mail notice to the Owner and/or the current owner of

the Property as shown on the latest adopted County assessment roll. The notice shall describe the Improvements to be completed by Owner, the time within which the construction of the Improvements shall begin and the time within which the Improvements must be completed. The City Engineer may require the installation of all or a portion of the Improvements. Owner agrees to begin and complete the construction of the Improvements within the time specified in the notice given by the City Engineer and to notify the City at least 48 hours before starting work.

1.1 Permits; Notices. Prior to commencing any work, Owner shall, at its sole cost, expense, and liability, obtain all necessary permits and licenses and give all necessary and incidental notices required for the lawful construction of the Improvements and performance of Owner's obligations under this Agreement. Owner shall conduct the work in full compliance with the regulations, rules, and other requirements contained in any permit or license issued to Owner.

1.2 Pre-approval of Plans and Specifications. Owner is prohibited from commencing work on the Improvements until all plans and specifications for such Improvements have been submitted to and approved by the City Engineer, or his or her designee. Approval by the City Engineer shall not relieve Owner from ensuring that all Improvements conform with all other requirements and standards set forth in this Agreement.

1.3 Quality of Work; Compliance With Laws and Codes. The construction plans and specifications for the Improvements shall be prepared in accordance with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements. The Improvements shall be completed in accordance with all approved maps, plans, specifications, standard drawings, and special amendments thereto on file with City, as well as the Americans with Disabilities Act, and all applicable federal, state, and local laws, ordinances, regulations, codes, standards, and other requirements applicable at the time work is actually commenced.

1.4 Standard of Performance. Owner and its contractors, if any, shall perform all work required to construct the Improvements under this Agreement in a skillful and workmanlike manner, and consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Owner represents and maintains that it or its contractors shall be skilled in the professional calling necessary to perform the work. Owner warrants that all of its employees and contractors shall have sufficient skill and experience to perform the work assigned to them, and that they shall have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the work, and that such licenses, permits, qualifications and approvals shall be maintained throughout the term of this Agreement.

1.5 Fees and Charges. Owner shall, at its sole cost, expense, and liability, pay all fees, charges, and taxes arising out of construction of the Improvements, including, but not limited to, all plan check, design review, engineering, inspection, and other service fees, and any impact or connection fees established by City ordinance, resolution, regulation, or policy.

1.6 City Inspection of Improvements. Owner shall, at its sole cost, expense, and liability, and at all times during construction of the Improvements, maintain reasonable and

safe facilities and provide safe access for inspection by City of the Improvements and areas where construction of the Improvements is occurring or will occur.

2. Default; Notice; Remedies.

2.1 Notice. If Owner neglects, refuses, or fails to fulfill or timely complete any obligation, term, or condition of this Agreement, or if City determines there is a violation of any federal, state, or local law, ordinance, regulation, code, standard, or other requirement, City may at any time thereafter declare Owner to be in default or violation of this Agreement and make written demand upon Owner, to immediately remedy the default or violation ("Notice"). Owner shall substantially commence the work required to remedy the default or violation within ten (10) days of the Notice. If the default or violation constitutes an immediate threat to the public health, safety, or welfare, City may provide the Notice verbally, and Owner shall substantially commence the required work within twenty-four (24) hours thereof.

2.2 Failure to Remedy; City Action. If the work required to remedy the noticed default or violation is not diligently prosecuted to a completion acceptable to City within the time frame contained in the Notice, City may complete all remaining work, arrange for the completion of all remaining work, and/or conduct such remedial activity as in its sole and absolute discretion it believes is required to remedy the default or violation. All such work or remedial activity shall be at the sole and absolute cost, expense, and liability of Owner and without the necessity of giving any further notice to Owner. City's right to take such actions shall in no way be limited by the fact that Owner may have constructed any, or none of the required or agreed upon Improvements at the time of City's demand for performance. In the event City elects to complete or arrange for completion of the remaining work and Improvements, City may require all work by Owner to cease in order to allow adequate coordination by City. If the City elects to complete or arrange for the construction and/or completion of the Improvements, the City may place a lien on the Property for the cost of such work. If City sues to compel performance of this Agreement, to recover the cost of completing the Improvements or to enforce the lien, Owner shall pay all reasonable attorney's fees, costs of suit and all other expenses incurred by City in connection therewith, and the attorney's fees, costs and other expenses shall also become a lien on the Property.

2.3 Other Remedies. No action by City pursuant to Section 2.0 et seq. of this Agreement shall prohibit City from exercising any other right or pursuing any other legal or equitable remedy available under this Agreement or any federal, state, or local law. City may exercise its rights and remedies independently or cumulatively, and City may pursue inconsistent remedies. City may institute an action for damages, injunctive relief, or specific performance.

3. Administrative Costs. If Owner fails to construct and install all or any part of the Improvements within the time required by this Agreement, or if Owner fails to comply with any other obligation contained herein, Owner shall be liable to City for all administrative expenses, fees, and costs, including reasonable attorney's fees and costs, incurred in obtaining compliance with this Agreement or in processing any legal action or for any other remedies permitted by law.

4. Acceptance of Improvements; As-Built or Record Drawings. If the Improvements are properly completed by Owner and approved by the City Engineer, and if they comply with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements, the City Council shall be authorized to accept the Improvements. Upon acceptance of the Improvements by City, Owner shall file with the Recorder's Office of the County of Contra Costa a notice of completion for the accepted Improvements in accordance with California Civil Code section 3093, at which time the accepted Improvements shall become the sole and exclusive property of City without payment therefor.

5. Relationship Between the Parties. The Parties hereby mutually agree that neither this Agreement, nor any other related entitlement, permit, nor approval issued by City for the Property shall operate to create the relationship of partnership, joint venture, or agency between City and Owner. Owner's contractors and subcontractors are exclusively and solely under the control and dominion of Owner. Nothing herein shall be deemed to make Owner or its contractors an agent or contractor of City

6. Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority make this Agreement and bind each respective Party.

7. Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate, or convenient to attain the purposes of this Agreement.

8. Construction; References; Captions. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days. All references to Owner include all personnel, employees, agents, and subcontractors of Owner, except as otherwise specified in this Agreement. All references to City include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

9. Notices. All notices, demands, invoices, and written communications shall be in writing and delivered to the following addresses or such other addresses as the Parties may designate by written notice:

CITY:	**OWNER:**
City of Lafayette 3675 Mt. Diablo Blvd. #210 Lafayette, California 94549-1968 Attn: City Engineer	Desmond and Kathryn Allen 567 Merriewood Drive Lafayette, California 94549

Depending upon the method of transmittal, notice shall be deemed received as follows: by facsimile, as of the date and time sent; by messenger, as of the date delivered; and by U.S. Mail first class postage prepaid, as of 72 hours after deposit in the U.S. Mail.

10. Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

11. Waiver. City's failure to insist upon strict compliance with any provision of this Agreement or to exercise any right or privilege provided herein, or City's waiver of any breach of this Agreement, shall not relieve Owner of any of its obligations under this Agreement, whether of the same or similar type. The foregoing shall be true whether City's actions are intentional or unintentional. Owner agrees to waive, as a defense, counterclaim or set off, any and all defects, irregularities or deficiencies in the authorization, execution or performance of the Improvements or this Agreement, as well as the laws, rules, regulations, ordinances or resolutions of City with regards to the authorization, execution or performance of the Improvements or this Agreement.

12. Assignment or Transfer of Agreement. Owner shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without prior written consent of City. Any attempt to do so shall be null and void, and any assignee, hypothecatee, or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation, or transfer. Unless specifically stated to the contrary in City's written consent, any assignment, hypothecation, or transfer shall not release or discharge Owner from any duty or responsibility under this Agreement.

13. Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

14. No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

15. Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

16. Consent to Jurisdiction and Venue. This Agreement shall be construed in accordance with and governed by the laws of the State of California. Any legal action or proceeding brought to interpret or enforce this Agreement, or which in any way arises out of the Parties' activities undertaken pursuant to this Agreement, shall be filed and prosecuted in the appropriate California State Court in the County of Contra Costa, California. Each Party waives the benefit of any provision of state or federal law providing for a change of venue to any other court or jurisdiction including, without limitation, a change of venue based on the fact that a governmental entity is a party to the action or proceeding, or that a federal right or question is involved or alleged to be involved in the action or proceeding. Without limiting the generality of the foregoing waiver, Owner expressly waives any right to have venue transferred pursuant to California Code of Civil Procedure Section 394.

17. Attorneys' Fees and Costs. If any arbitration, lawsuit, or other legal action or proceeding is brought by one Party against the other Party in connection with this Agreement or the Property, the prevailing party, whether by final judgment or arbitration award, shall be entitled to and recover from the other party all costs and expenses incurred by the prevailing party, including actual attorneys' fees ("Costs"). Any judgment, order, or award entered in such legal action or proceeding shall contain a specific provision providing for the recovery of Costs, which shall include, without limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (a) post judgment motions and appeals, (b) contempt proceedings, (c) garnishment, levy, and debtor and third party examination, (d) discovery, and (e) bankruptcy litigation. This section shall survive the termination or expiration of this Agreement.

18. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

_____

Mike Anderson, Mayor

ATTEST:

_____

Joanne Robbins, City Clerk

OWNER:

(Note: Owners' signatures must be notarized.)

_____

_____

EXHIBIT B

Response from Property Owners to Standard Agreement

ALLEN
567 Merriewood Drive
Lafayette, CA 94549

RECEIVED
JAN 28 2008
CITY OF LAFAYETTE
ENGINEERING DEPT.

January 23, 2008

John M. Luttropp
Engineering Services Division
City of Lafayette
3675 Mt. Diablo Blvd.
Lafayette, CA 94549

Re: Item 8B - 11/13/07 City Council Hearing

Dear Mr. Luttropp:

Thank you for your January 8, 2008 correspondence and Deferred Improvement Agreement. The Agreement is unacceptable for various reasons, chief among them the following:

The Agreement requires that we complete Improvements at the "sole discretion" of the City Engineer. This is not what we agreed to at the 11/13/07 City Council hearing. Rather, we agreed to pay the proportionate cost to restore the portion of sidewalk removed if and when the City installs a connecting sidewalk on Merriewood Drive. Indeed, Mayor Federighi made clear that her vote was expressly conditioned on that proviso.

Further, the determination of the necessity of a sidewalk based on "public health, welfare and safety" appears to be a matter for the City Council to decide, not the City Engineer "in his or her sole discretion."

The majority of the terms and conditions are unfair, vague, and/or impossible to comply with. For example, we are being asked to agree to complete work within any time frame specified by the City Engineer (again at his sole discretion). If we are unable to do so, or the City Engineer is dissatisfied with the work, he may put a lien on our property. This troubling provision raises the same issues raised by the Engineering Department's first hang-tag notice requesting completion of work (with approved plans and permits), within ten (10) days, a deadline which is impossible to meet. Under this Agreement, we could be faced with the same uneasonable/impossible deadline resulting in a lien on our property.

The six page draft Agreement is completely one-sided and overreaching, and particularly objectionable due to the inclusion of various waivers of defenses and constitutional rights. On the other hand, the City is not obligated to do anything under the Agreement,

not even forebear from suing us in exchange for signing the Agreement (which we understood to be the agreement based on the Council's rejection of Option 3).

The Agreement also improperly attempts to shift all liability to the homeowner for ADA violations and the like. As stated in our prior letters, the City has been under an affirmative obligation to install curb ramps since at least 1993 when the ADA was enacted, plus each time streets are altered or resurfaced. Why would we agree to be responsible for installing an ADA ramp (and assuming all liability) when the City failed to comply with the ADA over fifteen years ago?

The draft Agreement requires payment of the City's administrative costs and attorney fees (Section 3). This is unacceptable. Likewise, since the City is not obligated to do anything under this Agreement, Section 17 is effectively non-reciprocal and therefore unacceptable.

We remain willing to pay the proportionate cost to replace the portion of sidewalk removed, if and when the City installs a connecting sidewalk on Merriewood Drive. We are also willing to sign a fair, arm's length agreement entered into in good faith. If these issues cannot be resolved in the coming weeks, we are available to discuss the matter at a City Council hearing in March.

Thank you.

Sincerely,

Desmond Allen

Kathryn Allen

cc: City Council

EXHIBIT C
Agreement Proposed by Property Owners

Hand delivered to
John M. Luttropp
2/27/08

RECORDED AT THE REQUEST OF
AND RETURN TO:

City of Lafayette
Engineering Services Division
3675 Mt. Diablo Boulevard, Suite 210
Lafayette, California 94549
Attn: City Engineer

DEFERRED IMPROVEMENT AGREEMENT & RELEASE OF CLAIMS

This Deferred Improvement Agreement and Release of Claims is entered into as of this ____ day of February, 2008, by and between the City of Lafayette, a municipal corporation ("City") and Desmond and Kathryn Allen (collectively, "Owner"). City and Owner are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties".

RECITALS

A. Owner owns certain real property more commonly known as 567 Merriewood Drive, Lafayette, California, Assessor Parcel Number 237-280-0017 and more specifically described in Exhibit "A" attached hereto and incorporated herein by reference ("Property").

B. The City alleges an unpermitted removal of a portion of an existing sidewalk on the southwest corner of Merriewood Drive and Sandalwood Court (extending from the left side of the property's driveway on Sandalwood Court to the intersection with Merriewood Drive). The City may, in the future, restore such improvements ("Improvements").

C. The Owner alleges that buckling portions of the Improvements were removed in order to alleviate a tripping hazard after the City advised Owner that City was not responsible for repair or maintenance of the sidewalk. The Owner alleges that it researched permit requirements on the City's website and found an exemption for light landscaping in the City's right of way. The Owner further alleges that the City's Tree Protection Ordinance prohibits paving, construction, and related activities within a 90 foot radius of the Protected Tree.

D. Without admission of fault or liability the Parties desire to resolve any and all disputes between them and to effectuate a release, termination and settlement of this dispute. As set forth in detail below, as consideration for the promises, releases, covenants, and obligations set forth in this Agreement, the City and Owner are willing to agree to a deferral of Improvements in accordance with the terms and conditions hereafter set forth.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants

contained in this Agreement the Parties agree as follows:

1. Improvements. Subject to the conditions set forth herein, the City agrees to defer restoration of Improvements. However, if and when the City (at its sole expense) installs a continuous sidewalk on Merriewood Drive which includes a connection to the sidewalks on Sandalwood Court ("Merriewood Sidewalk"), the Owner shall reimburse City for the reasonable cost to restore the Improvements (as that term is defined above). The construction of the Improvements shall be deferred until such time as the City Council reasonably determines that there is no further reason to defer construction of the Improvements because their construction is necessary for the public health, welfare and safety or is necessary for the orderly development of the surrounding area. In that event, the City Engineer shall mail notice to the Owner and/or the current owner of the Property as shown on the latest adopted County assessment roll. The notice shall advise Owner of the reasonable costs for the Improvements to be paid by Owner (along with adequate supporting documentation showing calculation of such costs, on a square footage basis in relation to the total cost for installation of the Merriewood Sidewalk). The City may require reimbursement for all or a portion of the Improvements. Owner agrees to reimburse the City for the reasonable costs of the Improvements within thirty (30) days of receipt of the notice given by the City Engineer.

1.1 Quality of Work; Compliance With Laws and Codes. The City's construction plans and specifications for installation of the Merriewood Sidewalk and the Improvements shall be prepared in accordance with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements. The Merriewood Sidewalk and Improvements shall be completed in accordance with the City's approved maps, plans, specifications, standard drawings, and special amendments thereto on file with City, as well as the Americans with Disabilities Act, and all applicable federal, state, and local laws, ordinances, regulations, codes, standards, and other requirements applicable at the time work is actually commenced.

1.2 Standard of Performance. The City and its contractors, if any, shall perform all work required to construct the Merriewood Sidewalk and the Improvements under this Agreement in a skillful and workmanlike manner, and consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. The City represents and maintains that it or its contractors shall be skilled in the professional calling necessary to perform the work. The City warrants that all of its employees and contractors shall have sufficient skill and experience to perform the work assigned to them, and that they shall have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the work, and that such licenses, permits, qualifications and approvals shall be maintained throughout the term of this Agreement.

2. Default; Notice; Remedies.

2.1 Notice. If Owner neglects, refuses, or fails to timely reimburse the City in accordance with this Agreement, City may at any time thereafter declare Owner to be in default or violation of this Agreement and make written demand upon Owner, to immediately remedy the default ("Notice"). Owner shall then remedy the default within thirty (30) days of the Notice.

3. Acceptance of Improvements If the Improvements are paid for by Owner in accordance with this Agreement, the City Council shall be deemed to have accepted the Improvements, and the City shall file with the Recorder's Office of the County of Contra Costa a notice of completion for the accepted Improvements in accordance with California Civil Code section 3093, at which time the accepted Improvements shall become the sole and exclusive property of City without payment therefore, and the Owner (and its successors and assigns) shall be relieved from any further obligation under this Agreement..

4. Release. In consideration of the mutual promises and covenants contained in this Agreement and except as otherwise provided herein, the City, on the one hand, and Owner, on the other hand, hereby release, remise, acquit and forever, absolutely and unconditionally discharge each other and each and all of their agents, attorneys, representatives, heirs, devisees, and assigns, of and from any and all actions, causes of actions, claims, demands, rights, debts, obligations, liabilities, interests, contracts, duties, damages, costs, attorneys' fees, expenses or losses of every kind, nature, character, or description whatsoever, by whomever asserted, whether known or unknown, anticipated or unanticipated, direct or indirect, fixed or contingent, arising from any matter, cause or thing, whatsoever occurred, done or omitted, as of the date of this Agreement, including, without limitation, any matters arising out of, related to or connected with the Improvements.

5. Waiver of Civil Code Section 1542. It is intended that this Agreement shall be effective as a bar to each and every action, cause of action, claim, liability, obligation, damage, right, interest, injury, loss, salary, commission, benefit, attorney fee and cost, whether known or unknown, foreseen or unforeseen, suspected or unsuspected, that the City, on the one hand, and Owner, on the other hand, may have against each other. The Parties expressly waive any and all rights under Paragraph 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.

6. No Admission. Each Party acknowledges that this Agreement affects the settlement of claims which are denied and contested by the other, and that nothing contained herein shall be construed as an admission of liability by or on behalf of either Party, all of which liability is expressly denied. Neither this Agreement nor any of its terms is admissible in any proceeding between the Parties, except a proceeding to interpret or enforce its terms.

7. Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority make this Agreement and bind each respective Party.

8. Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary or

appropriate to attain the purposes of this Agreement, including execution and recordation of any document necessary to evidence Owner's full compliance with the terms of this Agreement.

9. Construction; References; Captions. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days. All references to City include its elected officials, officers, employees, agents, volunteers, personnel, contractors, and subcontractors of City, except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

10. Notices. All notices, demands, invoices, and written communications shall be in writing and delivered to the following addresses or such other addresses as the Parties may designate by written notice:

CITY:	OWNER:
City of Lafayette 3675 Mt. Diablo Blvd. #210 Lafayette, California 94549-1968 Attn: City Engineer	Desmond and Kathryn Allen 567 Merriewood Drive Lafayette, California 94549

Depending upon the method of transmittal, notice shall be deemed received as follows: by facsimile, as of the date and time sent; by messenger, as of the date delivered; and by U.S. Mail first class postage prepaid, as of 72 hours after deposit in the U.S. Mail.

11. Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

12. Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

13. No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

14. Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

15. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of California.

16. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

17. Attorneys' Fees and Expenses. Each Party hereto shall bear its own attorneys' fees, expenses and costs incurred with respect to the preparation of this Agreement. In the event any Party to this Agreement brings suit, or is required to defend any action to enforce any provision of this Agreement, the unsuccessful party agrees to pay the successful party such court costs and attorneys fees as the court deems reasonable.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

Mike Anderson, Mayor

ATTEST:

Joanne Robbins, City Clerk

OWNER:

(Note: Owners' signatures must be notarized.)

Desmond J. Allen

Kathryn J. Allen

State of California)
)
County of Contra Costa)

On February 26, 2009, before me, Patricia A. Wenthe, a Notary Public
Insert Name and Title of Officer

personally appeared Kathryn J. Allen
Name(s) of Signer(s)

,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(ies), and that by ~~his~~/her/~~their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

PATRICIA A. WENTHE
Commission # 1535063
Notary Public - California
Contra Costa County
My Comm. Expires Jan 12, 2009

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Place Notary Seal Above]

Signature: Patricia A. Wenthe
Signature of Notary Public

16. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

17. Attorneys' Fees and Expenses. Each Party hereto shall bear its own attorneys' fees, expenses and costs incurred with respect to the preparation of this Agreement. In the event any Party to this Agreement brings suit, or is required to defend any action to enforce any provision of this Agreement, the unsuccessful party agrees to pay the successful party such court costs and attorneys fees as the court deems reasonable.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

_____
Mike Anderson, Mayor

ATTEST:

_____
Joanne Robbins, City Clerk

OWNER:

(Note: Owners' signatures must be notarized.)

_____
Desmond J. Allen

_____
Kathryn J. Allen

State of California)
)
County of Marin)

On February 26, 2008, before me, Denise Helstrom, Notary Public
Insert Name and Title of Officer

personally appeared Desmond J. Allen
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

DENISE L. HELSTROM
Commission # 1652893
Notary Public - California
Marin County
My Comm. Expires Apr 17, 2010

[Place Notary Seal Above]

Signature: Denise L Helstrom
Signature of Notary Public

EXHIBIT D

Revised Agreement based on Phone Negotiations with Property Owner

RECORDED AT THE REQUEST OF
AND RETURN TO:

City of Lafayette
Engineering Services Division
3675 Mt. Diablo Boulevard, Suite 210
Lafayette, California 94549
Attn: City Engineer

DEFERRED IMPROVEMENT AGREEMENT

This Deferred Improvement Agreement is entered into as of this ____ day of _____, 2008, by and between the City of Lafayette, a municipal corporation ("City") and Desmond and Kathryn Allen(collectively, "Owner"). City and Owner are sometimes hereinafter individually referred to as "Party" and hereinafter collectively referred to as the "Parties".

RECITALS

A. Owner owns certain real property more commonly known as 567 Merriewood Drive, Lafayette, California, Assessor Parcel Number 237-280-0017 and more specifically described in Exhibit "A" attached hereto and incorporated herein by reference ("Property").

B. As a remedy for the removal of an existing sidewalk on the southwest corner of Merriewood Drive and Sandalwood Court, the City requires the restoration of frontage sidewalk improvements from the property's driveway on Sandalwood Court to the southern end of the Sandalwood Drive curb return on Merriewood Drive ("Improvements").

C. Without admission of fault the Parties desire to resolve any and all disputes between them regarding the improvements. The City and Owner are willing to agree to a deferral of these Improvements in accordance with the terms and conditions hereafter set forth.

TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants contained in this Agreement the Parties agree as follows:

1. Improvements. Subject to the conditions set forth herein, the City agrees to defer restoration of Improvements. However, if and when the City (at its sole expense) constructs a sidewalk on Merriewood Drive from the Burton Valley School Driveway to Sandalwood Court ("Merriewood Sidewalk"), the Owner shall reimburse the City for the actual construction costs, as determined by competitive bid, to restore the Improvements (as that term is defined above). The construction of the Improvements shall be deferred until such time as the City Manager determines that there is no further reason to defer construction of the Improvements because their

construction is necessary for the public health, welfare and safety or is necessary for the orderly development of the surrounding area. In that event, the City shall mail notice to the Owner and/or the current owner of the Property as shown on the latest adopted County assessment roll. The notice shall describe the Improvements to be paid for by the Owner and shall include copies of the bids received by the City showing the bid prices to be paid for the various items of work Owner agrees to reimburse the City for the actual costs associated with the Improvements within thirty (30) days of receipt of the notice given by the City Engineer.

1.1 Quality of Work; Compliance With Laws and Codes. The construction of the Merriewood Sidewalk and the Improvements shall be in accordance with all applicable federal, state and local laws, ordinances, regulations, codes, standards, and other requirements, and shall be completed in accordance with all approved maps, plans, specifications, standard drawings, and special amendments thereto on file with City, as well as the Americans with Disabilities Act, and all applicable federal, state, and local laws, ordinances, regulations, codes, standards, and other requirements applicable at the time work is actually commenced.

2. Default; Notice; Remedies.

2.1 Notice. If Owner neglects, refuses, or fails to timely reimburse the City in accordance with this Agreement, City may at any time thereafter declare Owner to be in default or violation of this Agreement and make written demand upon Owner, to immediately remedy the default or violation ("Notice"). Owner shall remedy the default within thirty (30) days of the Notice.

2.2 Failure to Remedy; City Action. If the work required to remedy the noticed default is not diligently prosecuted, the City may place a lien on the Property for the cost of constructing the Improvements. If City sues to compel performance of this Agreement, to recover the cost of completing the Improvements or to enforce the lien, Owner shall pay all reasonable attorney's fees, costs of suit and all other expenses incurred by City in connection therewith, and the attorney's fees, costs and other expenses shall also become a lien on the Property.

2.3 Other Remedies. No action by City pursuant to Section 2.0 et seq. of this Agreement shall prohibit City from exercising any other right or pursuing any other legal or equitable remedy available under this Agreement or any federal, state, or local law. City may exercise its rights and remedies independently or cumulatively, and City may pursue inconsistent remedies. City may institute an action for damages, injunctive relief, or specific performance.

3. Administrative Costs. If Owner fails to reimburse the City for the costs of the Improvements within the time required by this Agreement, or if Owner fails to comply with any other obligation contained herein, Owner shall be liable to City for all administrative expenses, fees, and costs, including reasonable attorney's fees and costs, incurred in obtaining compliance with this Agreement or in processing any legal action or for any other remedies permitted by law.

4. Relationship Between the Parties. The Parties hereby mutually agree that neither this Agreement, nor any other related entitlement, permit, nor approval issued by City for the

Property shall operate to create the relationship of partnership, joint venture, or agency between City and Owner.

5. Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority make this Agreement and bind each respective Party.

6. Cooperation; Further Acts. The Parties shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate, or convenient to attain the purposes of this Agreement.

7. Construction; References; Captions. It being agreed the Parties or their agents have participated in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days, or period for performance shall be deemed calendar days and not work days. All references to Owner include all personnel, employees, agents, and subcontractors of Owner, except as otherwise specified in this Agreement. All references to City include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.

8. Notices. All notices, demands, invoices, and written communications shall be in writing and delivered to the following addresses or such other addresses as the Parties may designate by written notice:

CITY:	**OWNER:**
City of Lafayette 3675 Mt. Diablo Blvd. #210 Lafayette, California 94549-1968 Attn: City Engineer	Desmond and Kathryn Allen 567 Merriewood Drive Lafayette, California 94549

Depending upon the method of transmittal, notice shall be deemed received as follows: by facsimile, as of the date and time sent; by messenger, as of the date delivered; and by U.S. Mail first class postage prepaid, as of 72 hours after deposit in the U.S. Mail.

9. Amendment; Modification. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

10. Binding Effect. Each and all of the covenants and conditions shall be binding on and shall inure to the benefit of the Parties, and their successors, heirs, personal representatives, or assigns. This section shall not be construed as an authorization for any Party to assign any right or obligation.

11. No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

12. Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

13. Attorneys' Fees and Costs. Each Party hereto shall bear its own attorneys' fees, expenses and costs incurred with respect to the preparation of this Agreement. If any arbitration, lawsuit, or other legal action or proceeding is brought by one Party against the other Party in connection with this Agreement or the Property, the prevailing party, whether by final judgment or arbitration award, shall be entitled to and recover from the other party all costs and expenses incurred by the prevailing party, including actual attorneys' fees ("Costs"). Any judgment, order, or award entered in such legal action or proceeding shall contain a specific provision providing for the recovery of Costs, which shall include, without limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (a) post judgment motions and appeals, (b) contempt proceedings, (c) garnishment, levy, and debtor and third party examination, (d) discovery, and (e) bankruptcy litigation. This section shall survive the termination or expiration of this Agreement.

14. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

_____

Mike Anderson, Mayor

ATTEST:

_____

Joanne Robbins, City Clerk

OWNER:

(Note: Owners' signatures must be notarized.)

_____

_____

EXHIBIT E

Property Owner Response to Revised Agreement

ALLEN
567 Merriewood Drive
Lafayette, CA 94549

March 14, 2008

VIA E-MAIL & U.S. MAIL
John M. Luttropp
City of Lafayette
Engineering Services Division
3675 Mt. Diablo Boulevard, Suite 210
Lafayette, California 94549

Re: Status of Item 8B City Council Hearing 11/13/07

Dear Mr. Luttropp:

This letter responds to your e-mail correspondence of March 12, 2008.

Your prior letter dated February 4, 2008 requested that we revise the Deferred Improvement Agreement by February 27, 2008 in order to resolve this matter. A copy of your February 4, 2008 letter is enclosed. We incurred the time and expense of preparing an Agreement that we felt accurately reflected the direction given by the City Council at the November 13, 2007 hearing. We took time off work and went through the trouble of notarizing and hand-delivering the Agreement to you by your deadline of February 27, 2008. Enclosed is a copy of our signed, notarized version of the Agreement.

Despite our good faith efforts to comply with the City Council's directive and all of the deadlines specified in your various letters, your March 12 correspondence now encloses a substantially revised version of the Deferred Improvement Agreement.

Most notably, your March 12 version specifies that our obligation for compliance will be triggered by the City's limited installation of a sidewalk on Merriewood Drive "from the Burton Valley School Driveway to Sandalwood Court ("Merriewood Driveway")." This installation would only result in a sidewalk in front of two properties, ours and the property next door at 563 Merriewood Drive. The City Council specified no such limited installation, and such limited installation would do little to improve pedestrian access to the school, especially since the main entrance to the school is located on Rohrer Drive (while the Merriewood entrance is used primarily for vehicular access), and a paved pedestrian path from Sandalwood already exists. Our understanding is that any future sidewalk would extend the full two blocks of Merriewood Drive[1], and certainly to the school's main entrance on Rohrer Drive to connect to an existing sidewalk.

[1] Merriewood Drive is only two blocks long and currently has no sidewalks.

Moreover, your March 12 version also fails to specify that the Agreement is in lieu of small claims court action. In fact, the Agreement fails to provide for any release of claims and the City expressly reserves the right to pursue all remedies, including inconsistent ones. This is not what we understood was decided at the November 13, 2007 City Council hearing.

All of the foregoing suggests that the Engineering Department is not acting is good faith. The numerous letters, e-mails, and telephone calls at work are bordering on harassment. We have made a good faith effort to comply on our end.

Sincerely,

Kathryn & Desmond Allen

cc: City Council (w/ encls. via e-mail)

16. Counterparts. This Agreement may be executed in counterpart originals, which taken together, shall constitute one and the same instrument.

17. Attorneys' Fees and Expenses. Each Party hereto shall bear its own attorneys' fees, expenses and costs incurred with respect to the preparation of this Agreement. In the event any Party to this Agreement brings suit, or is required to defend any action to enforce any provision of this Agreement, the unsuccessful party agrees to pay the successful party such court costs and attorneys fees as the court deems reasonable.

IN WITNESS WHEREOF, the representatives of the parties hereto have executed this Deferred Improvement Agreement as of the date first above written.

CITY:

CITY OF LAFAYETTE

_____
Mike Anderson, Mayor

ATTEST:

_____
Joanne Robbins, City Clerk

OWNER:

(Note: Owners' signatures must be notarized.)

_____
Desmond J. Allen

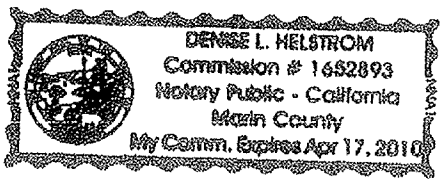
_____
Kathryn J. Allen

State of California)
)
County of Marin)

On February 26, 2008, before me, Denise Helstrom, Notary Public
Insert Name and Title of Officer

personally appeared Desmond J. Allen
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

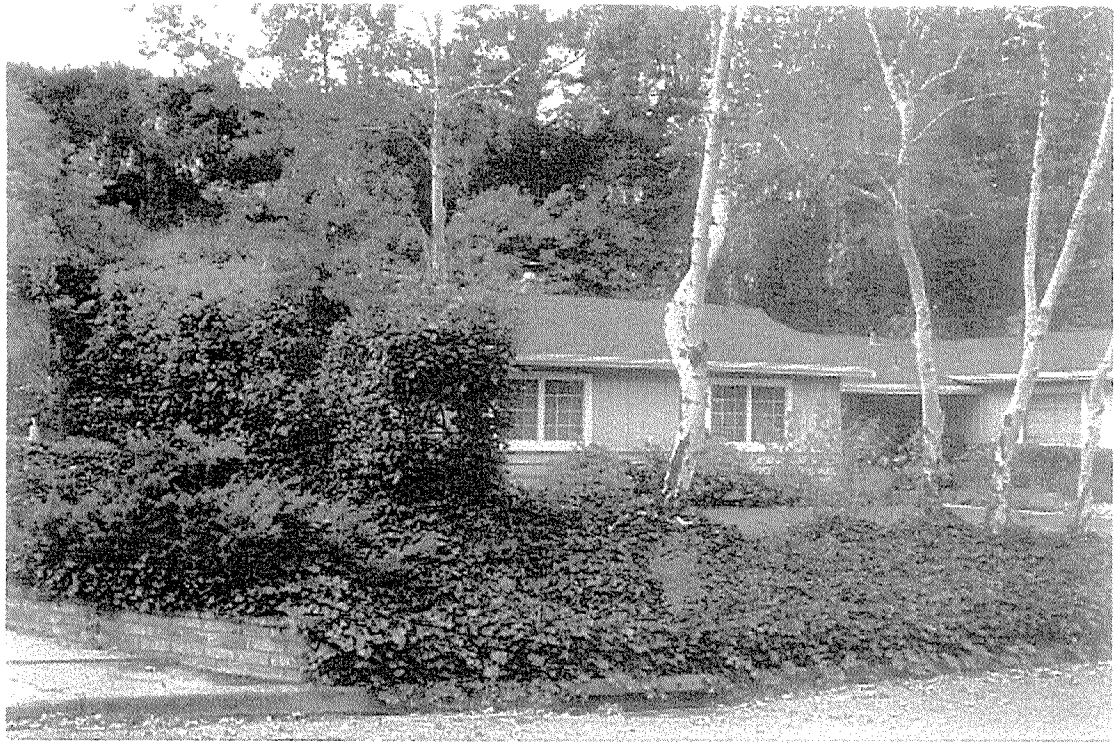


I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

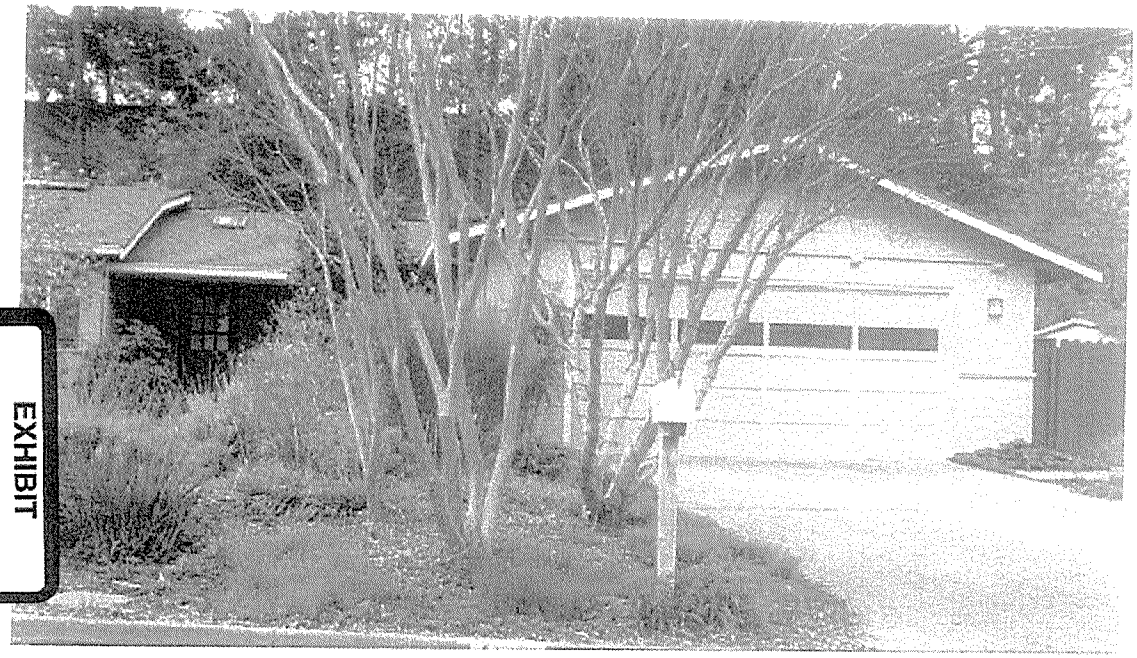
WITNESS my hand and official seal.

[Place Notary Seal Above]

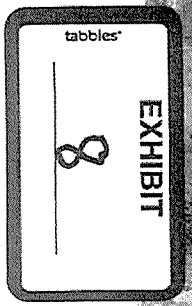
Signature: Denise L Helstrom
Signature of Notary Public



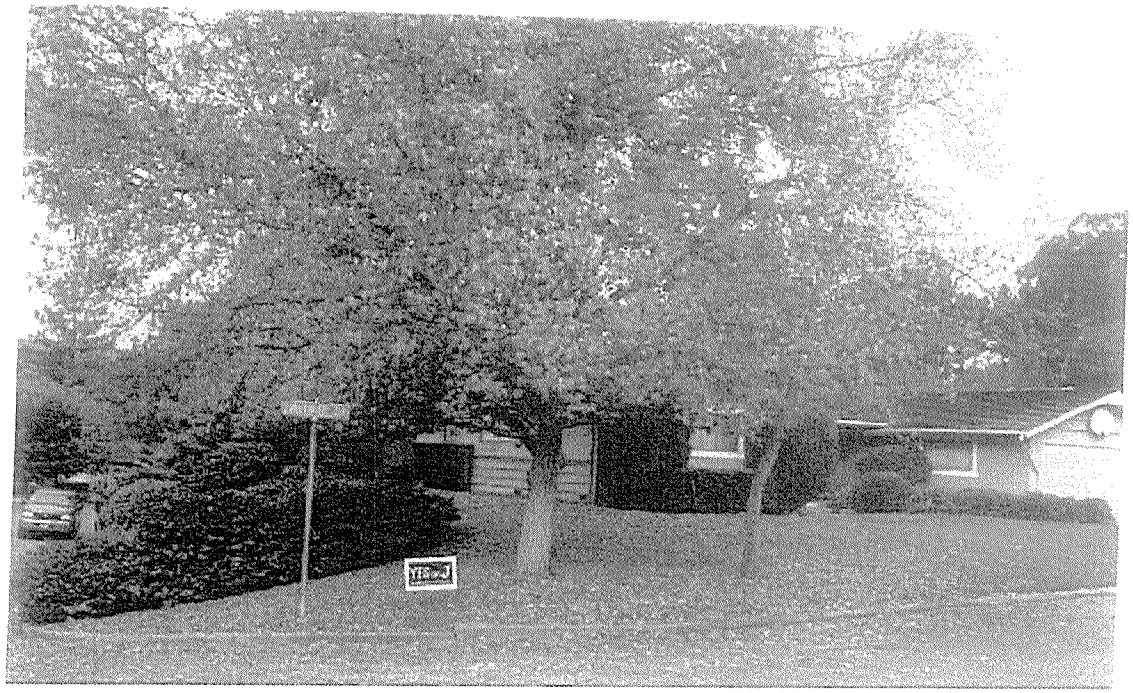
3119 Sandalwood Ct.
(no sidewalk)



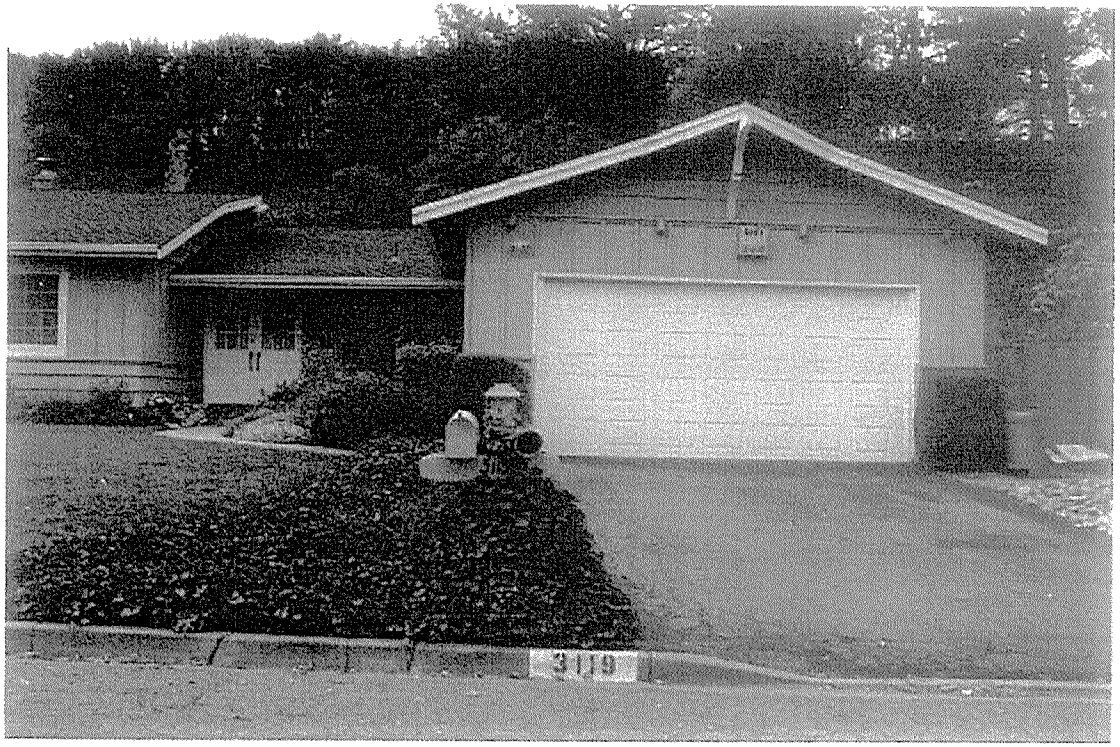
Sandalwood Ct.
(no sidewalk)



sandalwood ct.
(no sidewalk)



corner of Sandalwood Ct.
& Sweetbriar Cir
(no sidewalk)



Sandalwood Ct.
(no sidewalk)

sandalwood Ct.
(no sidewalk)